Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

CITY OF TALLAHASSEE,

Petitioner,

v.

ROY HARVEY EDWARDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the holding of *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981), that the cost-shifting provision of Federal Rule of Civil Procedure 68 does not apply when judgment is entered in favor of a defendant, should be overturned.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

Neither the Eleventh Circuit opinion (App. A) nor the district court opinion (App. B) is reported.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on October 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case centers on the proper interpretation of Federal Rule of Civil Procedure 68. In pertinent part, Rule 68 states:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. **If the judgment**

finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

STATEMENT OF THE CASE

A. Mr. Edwards' Lawsuit.

Roy Harvey Edwards, an employee of the electric department of the City of Tallahassee, filed suit against the City in state court, alleging violations by the City under the Age Discrimination and Employment Act, 29 U.S.C. § 621, *et seq.*; the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*; and the Florida Civil Rights Act of 1992, § 760.10, Florida Statutes, *et seq.* He claimed that his failure to receive promotions within the electric department were the result of unlawful age or disability discrimination by the City.

B. Proceedings Below.

The City of Tallahassee timely removed the action from state court to the federal district court for the Northern District of Florida on April 17, 1998, pursuant to 28 U.S.C. §§ 1441 and 1446. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal jurisdiction).

On May 29, 1999, after roughly one year of litigation and discovery, the City made an offer of judgment (App. E) to Mr. Edwards pursuant to Federal Rule of Civil Procedure 68. The offer was for judgment to be taken against the City in the total amount of $1,000, inclusive of attorney's fees, costs and all damages. The offer of judgment was rejected.

After the close of discovery, the City filed a motion for summary judgment which addressed all of Mr. Edwards' claims. The district court granted the City's motion for summary judgment (App. C), and final judgment was entered for the City on November 11, 1999. (App. D.) Mr. Edwards appealed the judgment to the Eleventh Circuit Court of Appeals, in a case styled *Roy Harvey Edwards v. City of Tallahassee*, Case Number 99-15255-B. The judgment was affirmed by the Eleventh Circuit Court of Appeals on August 2, 2000. *Edwards v. City of Tallahassee*, 229 F.3d 1169 (11th Cir. 2000).

The district court judgment in favor of the City ordered that costs be taxed against Mr. Edwards pursuant to 28 U.S.C. § 1920. The City thereafter moved for the taxation of costs, both those taxable under § 1920, and non-taxable costs incurred subsequent to the City's rejected offer of judgment. The district court allowed a portion of the requested costs under § 1920 but disallowed $1,242.90 in unspecified costs.

The district court denied the City's motion for imposition of non-taxable costs under Rule 68, citing this Court's opinion in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981). (App. B.) The City appealed the denial of its motion to the Eleventh Circuit Court of Appeals, in the case styled *City of Tallahassee v. Roy Harvey Edwards*, Eleventh Circuit Case Number 00-10624-B. On October 25, 2000, the Circuit Court, reiterating its obligation to follow the binding precedent of *Delta Air Lines v. August* as acknowledged by the City, affirmed the district court order. (App. A.) It is from this ruling of the Court of Appeals that the City the seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Plain Language and the History of Rule 68 Demonstrate that *Delta Air Lines* was Incorrectly Decided

While thoroughly cognizant and respectful of the principle of *stare decisis*, the City believes this case presents the rare occasion when the precedent of this Court should be reversed. As this Court explained in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 65, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996):

> . . . Generally, the principle of *stare decisis*, and the interests that it serves, viz., "the evenhanded, predictable, and consistent development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991), counsel strongly against reconsideration of our precedent. Nevertheless, we always have treated *stare decisis* as a "principle of policy, *Helvering v. Hallock*, 309 U.S. 106, 119, 84 L.Ed. 604, 60 S. Ct. 444, 125 ALR 1368 (1940), and not as an "inexorable command," *Payne*, 501 U.S., at 828, 115 L. Ed. 2d 720, 111 S. Ct. 2597. "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' " *Id.*, at 827, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (*quoting Smith v. Allwright*, 321 U.S. 649, 665, 88 L.Ed. 987, 64 S. Ct. 757, 151 ALR 1110 (1944)).

Delta Air Lines presents such a "badly reasoned" case.

The majority opinion in *Delta Air Lines* held that the plain language, the history and the purpose of Rule 68 all mandated that costs may not be imposed against a plaintiff who has rejected an offer of judgment and then subsequently loses his case, but may be imposed against a plaintiff who has rejected an offer of judgment and obtains a judgment less favorable than the offer. By concentrating on the phrase, "the judgment finally **obtained by the offeree**", the majority concluded that the appropriate focus of the rule was on the nominal judgment holder and not on the substantive outcome of the case. In so doing, the majority imposed upon litigants the illogical result that an entirely victorious defendant may be placed in a financially worse position under Rule 68 than a defendant who loses the case. As stated by Justice Powell in his rejection of the majority's "plain meaning" reading of Rule 68: "It is anomalous indeed that, under the court's view, a defendant may obtain costs under Rule 68 against a plaintiff who prevails in part but not against a plaintiff who loses entirely." *Delta Air Lines*, 450 U.S. at 362 (Powell, J., concurring on other grounds).

In his strong dissent, Justice (now Chief Justice) Rehnquist observed that the majority's plain meaning analysis "totally ignor[ed] the common sense maxim that the greater includes the lesser. . . ." *Delta Air Lines*, 450 U.S. at 369 (Rehnquist, J., dissenting). The greater — here, a "take nothing" judgment in favor of the defendant — surely includes the lesser, i.e., the plaintiff's failure to win more than the offer of judgment.

The majority opinion also erroneously relied on the history of Rule 68 to support its analysis. Three state statutes served as the basis for Rule 68: 2 Minn. Stat. § 9323 (Mason 1927); 4 Mont. Rev. Codes Ann. § 9770 (1935); N.Y. Civ.

Prac. Law § 177 (Cahill 1937). None of these statutes, however, required a plaintiff who had rejected an offer of judgment to **affirmatively obtain** a judgment in an amount less than the offer before post-offer costs could be imposed. Rather, the imposition of costs under each of the foundational statutes was triggered by the unsuccessful plaintiff's failure to obtain a judgment in an amount which exceeded the amount of the offer.[1] In fact, the original text of Rule 68 mirrored this language,[2] and the 1948 amendment which created the current language was not meant as a "substantive change."[3]

Thus, as cogently observed by Justice Rehnquist, the majority misinterpreted both the plain meaning and the history of Rule 68 and reaches a conclusion which simply defies common sense.

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1. 2 Minn. Stat. § 9323 (Mason 1927): ". . . if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor" ; 4 Mont. Rev. Codes Ann. § 9770 (1935): "If the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but he must pay the defendant's costs from the time of the offer" ; N.Y. Civ. Prac. Law § 177 (Cahill 1937): "If the plaintiff fail to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time."

2. Rule 68 originally stated, "If the adverse party fails to obtain a judgment more favorable than that offered. . . ."

3. Advisory Committee Notes on Amendment to Rules of Civil Procedure, 28 U.S.C. App., pp. 499-500, 5 F.R.D. 433, 483 (1946).

II. *Delta Air Lines* Does Not Serve the Purpose of Rule 68

The majority opined that the purpose of Rule 68, encouraging settlement, was furthered by its interpretation. The *Delta Air Lines* court noted that a plaintiff has incentive to settle under Rule 68 because the marginally successful plaintiff loses his presumptive right to an award of the post-offer of costs which ordinarily would be awarded under Rule 54(D) to the successful plaintiff. The Court reasoned that to award a prevailing defendant its post-offer costs would encourage defendants to make grossly low offers of judgment, which would naturally be rejected, with the ultimate effect of removing from the trial court the discretion it generally enjoys under Rule 54 in the event of a defense verdict.

Again, the rationale is illogical and defies not only the plain language of the rule, but also thwarts its obvious intent. As Justice Rehnquist noted,

> While I do not think it necessary to address the "policy" considerations relied upon by the Court when the intent of the drafters of the Rule is as plain as it is here, I do think it appropriate to note that no policy argument will convince me that a plaintiff who has refused an offer under Rule 68 and then has a "take nothing" judgment entered against her should be in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser amount than that which was offered pursuant to Rule 68. The construction of Rule 68 urged by the Court would place in a better position a defendant who tendered $10,000 to a

plaintiff under Rule 68 in a case where the plaintiff was awarded $5,000 than where the same tender was made and the plaintiff was awarded nothing. . . .

It may be said that to read the Rule according to its plain meaning as I see it will place barriers in the way of plaintiffs' suing defendants. The short answer to this argument is that any provisions such as Rule 68 designed to promote settlement, rather than litigation, of claims is bound to make a plaintiff take a look at his "hole card." By the same token, the availability of such a procedure is bound to make the defendant take a look at *his* "hole card" in order to make certain that he is using every means available to both avoid costly protracted litigation and possible loss of the case if it goes to trial. The Rule interpreted in accordance with its "plain meaning" offers a defendant a method for preventing further accrual of taxable costs in the case of inflated or "nuisance" lawsuits; if the plaintiff is of the opinion that the offer is too low to be worth acceptance or even serious consideration, he need not even respond to it and the case will, unless settled in some other manner, go to trial. By following such a course, a plaintiff who obtains a judgment in excess of the defendant's Rule 68 offer loses absolutely nothing; a plaintiff against whom a "take nothing" judgment is entered loses only the possibility that a district court might exercise its discretion and not award costs to the prevailing defendant. Although the vast increase in the amount of litigation in this Nation today is

> not a valid reason for twisting rules or statutes in order to reduce such volume, if the plain meaning of a rule may have a tendency to encourage settlement rather than trial, this is surely not an unfortunate mishap in our system of administering justice.

Delta Air Lines, 450 U.S. at 375, 380 (Rehnquist, J., dissenting).

Justice Rehnquist's dissent is all the more salient today than it was twenty years ago. U.S. Department of Justice statistics reflect a 125 percent increase in the filing of civil rights complaints in United States District Courts between 1990 and 1998, with only approximately one-third of these cases settling prior to trial.[4] One may surmise that there are many causes for this extraordinary increase in litigation, including the advent of the jury trial for Title VII cases under the Civil Rights Act of 1991 and the generally litigious environment in which we live. In any event, the incorrectly decided *Delta Air Lines* opinion certainly does not discourage the litigation of frivolous or marginal lawsuits and does little to encourage settlement of either meritorious or unfounded claims.

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4. U.S. Department of Justice, Bureau of Justice Statistics, "Civil Rights Complaints in U.S. District Courts, 1990-1998" (January, 2000).

CONCLUSION

The holding of *Delta Air Lines v. August* defies the plain language, history and purpose of Rule 68. In cases such as the one at bar, *Delta Air Lines* results in a prevailing defendant being placed in a worse position than a defendant whose offer of judgment is rejected and subsequently loses at trial, but in an amount less than the offer. The rationale of Chief Justice Rehnquist's dissent in *Delta Air Lines* rings even truer today than it did twenty years ago, due to the universally acknowledged explosion of litigation which our country has experienced in the years since *Delta Air Lines* was erroneously decided. If Rule 68 is to accomplish its purpose of early settlement of litigation, the holding of *Delta Air Lines* must be overturned.

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 25, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10624
Non-Argument Calendar

D. C. Docket No. 98-00144-CV-4-WS

ROY HARVEY EDWARDS,

Plaintiff-Appellee,

versus

CITY OF TALLAHASSEE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(October 25, 2000)

Before TJOFLAT, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

We affirm the judgment of the district court. As the court stated in its dispositive order of January 3, 2000, and as

appellant acknowledges, "under *Delta Airlines v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981), [Fed. R. Civ. P.] 68 does not apply to cases where a defendant has obtained a judgment."

Appellant has taken this appeal "in an effort to gain the Supreme Court's review and revision of its *Delta Air Lines* holding . . . ." Appellant's brief at 5. Appellant has a right to do that. In the interim, however, we are bound by the *Delta Air Lines* holding.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION GRANTING DEFENDANT'S MOTION FOR TAXATION OF COSTS AND DENYING DEFENDANT'S MOTION FOR FEES DATED JANUARY 3, 2000 AND ENTERED AND FILED JANUARY 4, 2000

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

4:98cv144-WS

ROY HARVEY EDWARDS,

Plaintiff,

v.

CITY OF TALLAHASSEE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR TAXATION OF COSTS AND DENYING DEFENDANT'S MOTION FOR FEES

Before the court are Defendant's motions for taxation of costs (doc. 78) and for attorney's fees and non-taxable costs (doc. 81). Plaintiff has responded (docs. 82 & 83) to both motions.

Appendix B

Plaintiff does not object to the taxation of costs allowed under Title 28, United States Code, Section 1920. Plaintiff does object, however, to Defendant's request for attorney's fees and non-taxable costs under Rule 68 of the Federal Rules of Civil Procedure. Plaintiff suggests that a Rule 68 award of fees and costs is precluded by *Delta Airlines v. August*, 450 U.S. 346, 101 S. Ct. 1146, 67 L.Ed.2d 287 (1981) (holding that Rule 68 offers have no effect where, as here, the defendant prevails).

While acknowledging that, under *Delta Airlines*, Rule 68 does not apply to cases where a defendant has obtained a judgment, Defendant first invites this court to revisit the majority decision in *Delta Airlines* and to follow, instead, the reasoning of the dissenting justices. In the alternative, Defendant suggests that Plaintiff's action was frivolous and that fees and non-taxable costs should be awarded to Defendant under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978).

The court finding neither of Defendant's arguments persuasive, it is ORDERED:

1. Defendant's request for attorney's fees and non-taxable costs (doc. 81) is DENIED.

2. Defendant's motion for costs (doc. 78) is GRANTED to the extent Defendant has supported its motion with appropriate documentation and to the extent Defendant seeks taxation of costs allowable under section 1920.

3. The clerk shall tax costs accordingly.

Appendix B

DONE AND ORDERED this 3rd day of January, 2000.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED NOVEMBER 10, 1999 AND ENTERED NOVEMBER 11, 1999

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

4:98cv144-WS

ROY HARVEY EDWARDS,

Plaintiff,

v.

CITY OF TALLAHASSEE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

Roy Harvey Edwards ("Edwards") contends that his employer, the City of Tallahassee ("City"), discriminated against him and subjected him to a hostile work environment based on his age and disability. He seeks relief under (1) the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621-634; (2) the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101-12213; and (3) the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes.

Appendix C

Before the court is the City's motion for summary judgment (doc. 58). Plaintiff has responded (doc. 67) in opposition to the motion, and the parties have been advised (doc. 74) that the motion would be taken under advisement as of a date certain.

I.

In support of its motion for summary judgment, the City has submitted deposition transcripts, answers to interrogatories, an affidavit, and other documents that reveal the following:

Edwards was born on February 14, 1943. In 1985, he was hired by the City as a journeyman lineman. He was assigned to Transmission and Distribution Operations, a division in the City's Electric Department. He continues in that position today.

In October, 1991, Edwards suffered a heart attack that required coronary artery by-pass surgery. When Edwards was released to return to work on March 2, 1992, Dr. Joseph Baker placed medical restrictions on him as follows:

> As a result of his recent operation, I would suggest that he not work on a stand-by basis, nor should he lift any more than 50 lbs. In addition, he should not be required to climb, due to some remaining problems with his right leg, and . . . he [should] be allowed at least 12 hour rest periods.

Edwards Dep., Ex. 9. There have been no material changes to these medical restrictions since 1992.

Appendix C

For a year or two after he returned to work, Edwards was given light duty assignments with the underground crew. When he no longer required light duty work, he was assigned regular journeyman lineman duties to the extent such duties were consistent with his medical restrictions. For a brief time, he was assigned a lineman's duties as a locator. A locator is responsible for identifying the location of underground cables and utilities before construction work is begun in the area. Edwards was given a different assignment, one at the training center, after his stint as a locator resulted in an unusual number of cable cuts due to mislocations. At the training center, Edwards used his expertise as a lineman to help train apprentice linemen. He remained at the training center until the center was temporarily closed during a departmental reorganization. The training center was later reopened after the responsibilities of administering the center were transferred to a newly created administrative department within the City. Although the Electric Department continued to provide support staff for the training center, Edwards did not return to the training center but was instead assigned to the field as an underground crew leader. According to Gary Oberschleke, Department Director, Edwards was not returned to the training center because the Electric Department then had a need for qualified technical people — like Edwards — in the field. Furthermore, after the reorganization, the training function was assigned to different linemen for varying periods of time as a learning experience.

From May, 1993, to April, 1995, Edwards unsuccessfully applied for the position of line crew foreman on at least three occasions. On the last of these occasions, Edwards was told that he would not be interviewed for the position because of

his physical constraints. Edwards noted on his calendar on March 14, 1995: "Terry Lowe [supervisor], about 8:18 a.m., told me I could and would not be promoted because of my physical constraints, referring to my heart problem." Edwards Dep. at 78. Edwards did not thereafter apply for any promotions because he felt it would be futile to do so. Of the four men who were promoted to line crew foreman during the 1993 to 1995 period, one was older than Edwards while three were younger.

Terry Lowe ("Lowe") was hired as Supervisor of Transmission and Distribution Operations on July 14, 1993. Since he began as Supervisor, Lowe has had discussions with Edwards regarding Edwards' work limitations. Edwards has said to Lowe on various occasions that he (Edwards) had lifting limitations, that he could not work long hours, that he could not work at night, that the stress was too great in some structures, and that he was unable to do some of the physical things needed to participate in some of the crew structures. According to Lowe, the City has attempted to accommodate Edwards despite his inability to perform all the duties of a journeyman lineman.

On August 21, 1995, Edwards received an "exceeds expectations" performance evaluation. On the evaluation form, Lowe noted as follows:

> Ray's physical limitations impact his ability to perform all tasks required of a journeyman lineman. These limitations may change his future responsibilities and position with the electric department.

Edwards Dep., Ex. 10. When asked at his deposition whether Edwards' physical limitations would prevent him from performing the duties of a line crew foreman, Lowe responded that, while his physical limitations alone would not eliminate Edwards from consideration for a foreman's job, there were other factors that made Edwards an undesirable candidate for such a position. In particular, Lowe cited Edwards' lack of communication skills and interpersonal relations skills.

On August 9, 1996, Edwards filed an administrative charge of discrimination in which he explained:

> Complainant has been looked over for promotion. . . . The constraints placed upon Complainant by his physician were used as the excuse for not promoting Complainant, and even for not interviewing him for positions. He was told by Lowe that the reason he had not gotten a promotion was because of the restraints. Complainant was removed from his position at the Training Facility and put on the line crew. Respondent knew that a lineman has to lift more than 50 pounds, and this assignment was in direct opposition to the restrictions imposed by Complainant's physician. Another requirement of a lineman's position is to climb — another restriction imposed by Complainant's physician. He is not supposed to work on stand-by because of the hours and stress of being on call 24 hours a day. Since Complainant's physician also recommended 12 hours rest per day, this is another

> requirement of the lineman position that should not have been imposed on Complainant. Complainant also believes that some of the adverse action taken against him has been because of his age. All persons hired and promoted with Respondent have been younger than Complainant.

Doc. 66, Ex. B. Edwards filed this age and disability discrimination lawsuit in March, 1998.

II.

Among other things, the City contends that Edwards' claims are time-barred. Under the ADEA and the ADA, a plaintiff's discrimination claims will be time-barred unless the plaintiff files a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or the Florida Commission on Human Relations ("FCHR") within three hundred (300) days of the alleged discriminatory employment action. Under Chapter 760, the limitations period is three hundred sixty-five (365) days.

Edwards filed his administrative charge of discrimination on August 9, 1996. For purposes of the ADEA and the ADA, his charge-filing period thus began on October 14, 1995, three hundred days before he filed his charge. For purposes of Chapter 760, his charge-filing period began on August 10, 1995. To the extent, if any, that Edwards seeks relief for the City's alleged discriminatory actions occurring within the applicable charge-filing periods, his claims are not time-barred. Otherwise, his claims are time-barred unless he demonstrates special circumstances.

Appendix C

Edwards in fact seeks relief for at least four promotion denials that occurred outside the applicable charge-filing periods. Edwards maintains that the continuing violation doctrine applies in his case to make the otherwise time-barred conduct actionable. Under the continuing violation doctrine, acts of discrimination that occur outside the charge-filing period are not time-barred if they are part of a continuing violation that extends into the limitations period. Stated differently, an otherwise time-barred claim may be considered timely if it and a timely-filed claim are treated as a single claim directed at continuing discriminatory conduct, part of which occurred within the statutory filing period.

The Eleventh Circuit has cautioned that even when a plaintiff proves a continuing policy of discrimination, relief may nonetheless be denied for specific discriminatory acts if the plaintiff knowingly fails to challenge the specific illegal acts within the relevant limitations period. *See Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793 (11th Cir.), *modified on reh'g*, 850 F.2d 1549 (11th Cir. 1988). As the Eleventh Circuit wrote in *Roberts*, 835 F.2d at 800, "[t]he continuing violation doctrine does not exist to give a second chance to an employee who allowed a legitimate . . . claim to lapse."

In *Roberts*, the plaintiff filed suit in 1983 alleging that his employer had discriminated against him by denying him promotions in 1977, 1978, and 1981. While finding no evidence of racial discrimination in the 1977 incident, the district court found that the 1978 and 1981 incidents arose out of a pattern and practice of discrimination that constituted a continuing violation. The judge accordingly awarded the plaintiff relief on both the 1978 and 1981 claims. The

Appendix C

Eleventh Circuit affirmed the district court's decision as to the 1981 violation but reversed the court's decision to award damages for the 1978 violation. Noting that the plaintiff did not file a timely charge of discrimination following the occurrence of the 1978 incident, the appellate court wrote:

> [E]ven if we assume that the 1978 discriminatory act continued into the statutory filing period, we must still conclude that Roberts' claim based on that incident is time-barred. Roberts admitted that he was aware of his rights in 1978. He could have asserted them at that time. To the extent that GMH injured him on a continuing basis as a result of the 1978 incident, it was only because he knowingly failed to exercise his right. A claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the [300]-day limitation period.

Roberts, 850 F.2d at 1550.

In this case, consistent with the lessons taught in *Roberts*, Edwards is not entitled to relief for discriminatory acts that allegedly occurred outside the applicable charge-filing period, *if*, before the charge-filing period began, Edwards knew, or had reason to know, that the acts were discriminatory. In an affidavit filed in response to the City's motion for summary judgment, Edwards says that he did not know "for sure" that the City was discriminating against him until sometime during the applicable charge-filing periods.

Edwards Aff. at ¶ 18. Before that time, he says, he merely suspected that the City was basing its employment decisions on his age and/or perceived disability.

The record, however, belies Edwards' self-serving effort to make timely otherwise time-barred events. Most notably, during his deposition, Edwards explicitly stated that he started to believe that the City was discriminating against him after he failed to get the promotion that Willie Leon received in February, 1994. He gave the following responses to defense counsel's questions:

> Q: [W]henever this Willie Leon selection occurred is when you started believing you were discriminated against based on disability and age correct?
>
> A: That is correct.
>
> Q: Did you complain to anybody about it?
>
> A: No.
>
> Q: Why not?
>
> A: Wouldn't do no [sic] good.
>
> Q: Well, you believe that there was action being taken against you in a discriminatory manner, correct?
>
> A: That is correct.
>
> . . . .

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Q: And you were aware that there was an equal opportunity employment department, correct?

A: Yes.

Q: And through your training and experience and familiarity with the city policy and procedures, you knew you could go there and lodge a complaint if you had one about discrimination, correct?

A: Yes.

Q: All right. But you chose not to do that?

A: Yes.

Q: Why was that?

A: Because it wouldn't do no [sic] good.

Q: Had you ever worked with the equal opportunity department or anyone at human resources or employee relations before?

A: Never had this problem before.

Q: So why didn't you think it would do any good? You had no experience with them, correct?

A: Well, I had seen what had happened with some other people's problems, and I just felt

since this was the highest level of management, my immediate supervisors, it wouldn't do any good anyway.

Q: What other people had you seen had problems and it wouldn't do any good? Who are the people, specifically?

A: Charles Martin, for one.

Q: What was his problem?

A: I don't know. He never did get into it with me.

. . . .

Q: Anybody else, other than Charles Martin, that you saw had — or that you believed had problems with human resources or trying to get problems resolved?

A: I can't remember any more right now.

Edwards Dep. at 48-50.

Also during his deposition, Edwards explained that, after Lowe told him in March, 1995, that he would not be interviewed for a promotion, he started keeping a daily calendar so that "[he]'d have a record of what was being done." Edwards Dep. at 21. When asked why he didn't apply for promotions in 1996 and 1998, Edwards responded:

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"Because of what Terry Lowe had told me [in March, 1995] about not being promoted." Edwards Dep. at 96.

Defense counsel questioned Edwards about other alleged examples of discrimination as well.

Q: Are you contending in this lawsuit that you've been discriminated against because of positions that they've placed you in, like, the various jobs that they've had you do since you've come back from your heart surgery? I guess that's my question.

A: Yes.

. . . .

Q: . . . Which particular job duties that you were performing where you believe there was some form of discrimination against you?

A: When they had me locating.

Q: The first time or the second time?

A: The first time [well outside the charge-filing period].

Q: What was wrong with having you locating the first time they did that?

. . . .

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A: Well, I felt they were going to use anything I did to try and get rid of me.

Edwards Dep. at 122-124.

After his first locating assignment, Edwards was moved to the training center. He was working at the training center when he applied for the 1994 and 1995 promotions. In his affidavit, Edwards states: "With respect to being reassigned to the lineman training center, I considered this to be disciplinary and against me because of my age and/or disability." Edwards Aff. at ¶ 4 n.7.[1]

It is evident from Edwards' own statements that he came to believe at least by March, 1995, that the City was discriminating against him on the basis of his disability and/or age. He nonetheless waited until August 9, 1996, to file his charge of discrimination. Like the plaintiff in *Roberts*, Edwards could have asserted his rights by filing timely charges of discrimination. Because he failed to do so, Edwards is now barred from seeking relief for the City's alleged discriminatory actions that occurred outside the charge-filing periods.

III.

Edwards alleges that he was subjected to a hostile work environment on the basis of his age and disability. To succeed

---

1. While Edwards states in his affidavit that he considered his move to the training center discriminatory, he suggests in his administrative charge that his removal from the training center was discriminatory.

with his hostile environment claim, Edwards must demonstrate that the workplace was permeated with "discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). The City suggests that there is no competent evidence to support such a claim. This court agrees.

IV.

As to the surviving claims, if any, the City maintains that Edwards has not established a prima facie case of age or disability discrimination. The City also contends that Edwards has failed to produce any competent evidence to show that the City's reasons for its decisions were pretextual. Again, this court agrees.

Edwards' affidavit is replete with conclusory assertions, inadmissible hearsay, and inconsistencies. He says, on the one hand: "I can do overhead work as it is within my medical restrictions." Edwards' Aff. at ¶ 20. On the other hand, he goes on to say:

> I try to limit myself in that work, however, but I can perform the overhead transmission and overhead distribution work. In other words, my medical condition does not limit my ability to do that overhead work but I try not to do it so as not to cause me any problems.

Id.

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He says that, on June 11, 1996, a female co-worker advised him that he was on a list of twelve people that the City wanted to "get rid of." Edwards Aff. at ¶ 18. He does not name this co-worker; nor does he produce a sworn statement from her. He says that a co-worker, Clayton Spivey, told him that he needed to watch his back because "they" were after him. Edwards Aff. at ¶ 19. Again, he does not produce a sworn statement from the declarant.

He says: "I also had interpersonal relations skills, the attitude, organization skills and communication skills, if any, needed for the [foreman] position." Edwards Aff. at ¶ 23. At the same time, he submits the deposition of Mac McCloud ("McCloud"), who says:

> The biggest problem that I ever had with Roy was personality conflict with other people. He had a pretty negative attitude towards just about everybody. It is hard to get him to say anything good about anybody, and that was the biggest problem that I had with Roy as a supervisor on a truck. Not really a supervisor, but as a lead worker on a truck.
>
> A lot of times he would have trouble with some of the men and it really wasn't — it really wasn't their fault. . . . Several people come [sic] to me and told me they had trouble working with Roy. And Roy and I had talked about it.

McCloud Dep. at 31-32.

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Edwards says "line crew foremen do not actually perform the physical work." Edwards Aff. at ¶ 12. McCloud, who is a roving foreman, says otherwise. At his deposition, McCloud answered defense counsel's questions as follows:

> Q: As the supervisor that you are now . . . [a]t any point in time, during any day you could have to go out and work on that crew and perform the same duties that those journeymen linemen do and that overhead crew may have to do; is that right?
>
> A: This is right.

While the court must resolve doubts in favor of the party opposing summary judgment, the evidence produced by Edwards is simply insufficient to defeat the City's properly supported motion. Accordingly, it is ORDERED:

1. The City's motion for summary judgment (doc. 58) is GRANTED.

2. The clerk is directed to enter judgment in the City's favor and against Edwards. Costs shall be taxed against Edwards in accordance with 28 U.S.C. § 1920.

DONE AND ORDERED this 10th day of November, 1999.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION DATED, FILED AND ENTERED NOVEMBER 11, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. 4:98cv144-WS

ROY HARVEY EDWARDS,

VS

CITY OF TALLAHASSEE,

JUDGMENT

This action came to trial or hearing before the Court with the Honorable William Stafford presiding. The issues have been tried or heard and a decision has been rendered.

Judgment is entered in the City of Tallahassee's favor and against Roy Harvey Edwards. Costs shall be taxed against Edwards in accordance with 28 U.S.C. 1920.

ROBERT A. MOSSING, CLERK

November 11, 1999
DATE

s/ Angela M. Maxwell
Deputy Clerk:
Angela M. Maxwell

APPENDIX E — OFFER OF JUDGMENT DATED MAY 20, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. 4:98CV144-WS

ROY HARVEY EDWARDS,

Plaintiff,

vs.

CITY OF TALLAHASSEE,

Defendant.

OFFER OF JUDGMENT

TO: MARIE MATTOX
310 East Bradford Road
Tallahassee, Florida 32303
(Attorney for plaintiff)

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant, CITY OF TALLAHASSEE, hereby offers to allow judgment to be taken against defendant in this action, in the total amount of One Thousand Dollars ($1,000.00), for all damages or compensation which may be claimed in this action, inclusive of attorney fees, costs and any other damages asserted in this matter. This Offer of Judgment is made for the purposes specified in Rule 68, and

is not to be construed either as an admission that the defendant is liable in this action, or that plaintiff has suffered any damage.

HENRY, BUCHANAN, HUDSON, SUBER & WILLIAMS, P.A.

s/ J. Steven Carter
J. STEVEN CARTER
Florida Bar No. 896152
Post Office Drawer 1049
Tallahassee, Florida 32302
(850) 222-2920